

**IN THE WATER COURT OF THE STATE OF MONTANA  
CONFEDERATED SALISH AND KOOTENAI TRIBES COMPACT**

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| IN THE MATTER OF THE ADJUDICATION | ) |                          |
| OF EXISTING AND RESERVED RIGHTS   | ) |                          |
| TO THE USE OF WATER, BOTH SURFACE | ) | <b>CASE NO. WC-201_-</b> |
| AND UNDERGROUND, OF THE           | ) |                          |
| CONFEDERATED SALISH AND KOOTENAI  | ) |                          |
| TRIBE OF INDIANS OF THE STATE OF  | ) |                          |
| MONTANA                           | ) |                          |

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**PRELIMINARY DECREE**

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THIS MATTER is before the Court on the joint motion of the State of Montana (“State”), the Confederated Salish and Kootenai Tribes (“Tribes”), and the United States of America on behalf of the Tribe (“United States”) for the entry of a Preliminary Decree confirming the water rights of the Tribes as recognized in the State of Montana – Confederated Salish and Kootenai Tribes Water Rights Compact of 2013 (“Compact”). The Compact is found at Mont. Code Ann. 85-20-xxxx. The Montana legislature approved the Compact in 2013; the United States Congress approved the Compact in 201\_ and the Tribes ratified the Compact in 201\_.

The Court has jurisdiction over this matter and enters this Preliminary Decree pursuant to Mont. Code Ann. 3-7-224, 85-2-231, and 85-2-702(3). Article VII.B.2 of the Compact provides that the Preliminary Decree shall include the entire Compact for purposes of notice and it is attached hereto as Decree Appendix 1. The Compact further provides that the Water Court’s review of the Compact is limited to the parts of the Compact that determine the Tribes’ water rights and their administration. See Compact, Article VII.B.2 in Decree Appendix 1. The Tribes, State and United States have in furtherance of Article VII.B.2 extracted the relevant parts of Articles III and IV of the Compact that, along with the abstracts of water rights attached

hereto as Decree Appendix 2<sup>1</sup> and Decree Appendix 3<sup>2</sup>, would comprise the Final Decree of the Tribes' water rights. These provisions of Article III and IV of the Compact are found below in Parts I through III of this Preliminary Decree. It is these provisions, along with the abstracts of water rights that are attached hereto as Decree Appendix 2 and Decree Appendix 3 that specifically delineate the elements of those rights set forth in Article III of the Compact that are administrable, that will be reviewed by the Court in this proceeding and that shall constitute the Tribes' water rights in a Final Decree.

Upon hearing the motion, the evidence presented, arguments of counsel, and being otherwise fully advised in the premises, the Court has determined that the motion should be GRANTED and it is hereby ORDERED, ADJUDGED AND PRELIMINARILY DECREED that the water rights quantified in the Compact are as follows:

**Part I. Definitions.**

Unless otherwise defined herein, capitalized terms used in this Preliminary Decree shall have the meaning set forth in the Compact.

**Part II. Holders and Use of the Water Rights of the Tribes.**

**A. Holders of the Water Rights of the Tribes.**

- (1) The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribes, their members and Allottees.<sup>3</sup> The name and mailing address of the holders of these rights are: The United States of America in trust for the Confederated Salish and Kootenai Tribes of Indians, c/o Regional Director, Bureau of Indian Affairs, Pacific Northwest Regional Office, 911 N.E. 11<sup>th</sup> Avenue, Portland, Oregon, 97232-4169;

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<sup>1</sup> Decree Appendix 2 is comprised of the Compact appendices for the Tribal Water Right.

<sup>2</sup> Decree Appendix 3 is comprised of Compact appendices for those Water Rights Arising Under State Law owned by the Tribes in whole or in part that are set forth in Article III.D.4.a.i and III.D.5 of the Compact.

<sup>3</sup> This sentence is copied from Article IV.A of the Compact. The other ownership information in this Part II.A is taken from the relevant abstracts of the rights that are included in Decree Appendices 2 and 3.

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Tribal Chairman, Confederated Salish and Kootenai Tribes of Indians, P.O. Box 278,  
Pablo, Montana 59855-0278.

- (2) For those Water Rights Arising Under State Law owned exclusively by the Tribes, the name and mailing address of the holder of the rights is: Tribal Chairman, Confederated Salish and Kootenai Tribes of Indians, P.O. Box 278, Pablo, Montana 59855-0278.
- (3) For those water rights co-owned by the Tribes and the Montana Fish Wildlife and Parks, the name and mailing address of the holders of the rights are: Tribal Chairman, Confederated Salish and Kootenai Tribes of Indians, P.O. Box 278, Pablo, Montana 59855-0278; Montana, State Dept of Fish Wildlife & Parks, P.O. Box 200701, Helena, Montana 59620-0701.
- (4) For those Water Rights Arising Under State Law co-owned by the Tribes and the United States Fish and Wildlife Service as part of the Tribal Water Right, the name and mailing address of the holders of the rights are: Tribal Chairman, Confederated Salish and Kootenai Tribes of Indians, P.O. Box 278, Pablo, Montana 59855-0278; USA (Department of the Interior Fish & Wildlife Service), Denver Federal Center, P.O. Box 25486, MS #60189, Denver, Colorado 80225-0486.

**B. Use of the Water Rights of the Tribes.**

- 1. Persons Entitled to Use the Water Rights of the Tribes.
  - a. The Tribal Water Right may be used by the Tribes, their Members, Allottees, or their lessees or assigns.
  - b. The Water Rights Arising Under State Law of the Tribes set forth in Article III of the Compact that are owned exclusively by the Tribes may be used by the Tribes, or their lessees or assigns.

- c. The Water Rights Arising Under State Law of the Tribes set forth in Article III of the Compact that are co-owned by the Tribes and Montana Fish Wildlife and Parks, or co-owned by the Tribes and the United States Fish and Wildlife Service, may be used by their owners.
2. Effect of Non-Use of the Tribal Water Right. Non-use of all or any portion of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture, or abandonment of such right.<sup>4</sup>

**Part III. Water Rights of the Tribes.**

The following provisions, except where noted in brackets, are as set forth in Article III.A through III.H of the Compact.

- A. **Religious and Cultural Uses.** The Tribal Water Right described in this [Part] III [of this Decree] includes all traditional, religious, or cultural uses of water by members of the Confederated Salish & Kootenai Tribes within Montana. Individual exercises of traditional cultural or religious uses are exempt from the Registration process contained in the Law of Administration. [As these uses are non-administrable, these rights do not have abstracts of water right associated with them.]
- B. **Abstracts of Water Right.** Abstracts of water right appended to this [Decree] are a substantive element of this [Decree]. [Second sentence omitted as unnecessary for this Decree.]
- C. **Basins 76L and 76 LJ and Flathead Indian Irrigation Project Irrigation Water Diversions from Basins 76F and 76N.**
  1. **Quantification.**

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<sup>4</sup> Parts II.B.1.a and B.2 are copied from Article IV.B.1. and B.2 of the Compact. Parts II.B.1.b-c are based on relevant parts of Article III of the Compact and the associated abstracts.

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- a. **Flathead Indian Irrigation Project.** The Tribes have the right to water that is supplied to the Flathead Indian Irrigation Project to be used for such purposes in such volumes and flow rates and from such sources of supply as identified in abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 5. The exercise of this portion of the Tribal Water Right is subject to the FIIP Water Use Agreement entered into by the Tribes, the Flathead Joint Board of Control, and the United States. That Agreement is attached to [the] Compact as Appendix 3.

The priority date for the portion of the Tribal Water Right used by the FIIP is July 16, 1855.

b. **Existing Uses by the Tribes, their Members and Allottees.**

- i. The Tribal Water Right includes all existing uses by the Tribes, their members and Allottees that are not Water Rights Arising Under State Law and are not otherwise specifically quantified in other sections of this [Part] III [of this Decree].
- ii. Water Rights Arising Under State Law held by the Tribes, their Members and Allottees will be satisfied pursuant to their own terms as finally decreed by the Montana Water Court or permitted by the DNRC.
- iii. For each existing use identified in [Part] III.C.1.b.i [of this Decree] to be valid and enforceable, the Tribes, or each Tribal member or Allottee claiming such an existing use shall complete the process for the registration of uses of the Tribal Water Right set forth in the Law of Administration. Such uses include but are not limited to irrigation, Stock Water, domestic, commercial, municipal and industrial, as well as those historically irrigated allotments that are held by individuals in trust by the United States that are not served by the FIIP that are identified on the map and table attached to [the Compact] as Appendix 6.
- iv. Uses of the Tribal Water Right for which abstracts are appended to this [Decree], including uses on the FIIP, are exempt from the registration requirement set forth in [Part] III.C.1.b.iii [of this Decree].
- v. The priority date for water uses registered pursuant to [Part] III.C.1.b.iii [of this Decree] and the Law of Administration is July 16, 1855.

- c. **Flathead System Compact Water.** The Tribes have a direct flow water right from the Flathead River with the following elements:

**Source of Water:** Flathead River, Flathead Lake, and the South Fork of the Flathead River up to Hungry Horse Reservoir

**Point of Diversion:** From Flathead Lake or the Flathead River, either on or off of the Reservation

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**Purpose:** Any beneficial use

**Diversion Volume:** 229,383 Acre-feet per year

**Depletion Volume:** 128,158 Acre-feet per year

**Period of Diversion and Depletion:** January 1 through December 31

- i. [As provided for in the Federal legislation ratifying the Compact and as] part of the Tribal Water Right quantified in [Part] III.C.1.c [of this Decree], the Tribes [have] an allocation of 90,000 Acre-feet per year, as measured at the Hungry Horse Dam, of storage water in Hungry Horse Reservoir.
- ii. This water right shall be used in a manner that ensures impacts associated with the exercise of this water right are such that those impacts are no greater than those identified in model run: Natural Q + 90K of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study (USBR, October 2012), appended [to the Compact] as Appendix 7. In the event that the impacts exceed those identified in model run: Natural Q + 90K of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study, the use of the water right set forth in this [Part] III.C.1.c [of this Decree] shall be reduced in such amounts as are necessary to immediately achieve impacts that are no greater than those identified in model run: Natural Q + 90K of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study.
- iii. The releases of the stored water identified in [Part] III.C.1.c.i [of this Decree] shall be limited in accordance with the "Biological Impact Evaluation and Operational Constraints for a proposed 90,000 Acre-foot withdrawal" (State of Montana, September 14, 2011) appended [to the Compact] as Appendix 8. The Parties upon mutual written agreement, and in conformance with other applicable provisions of law including but not limited to the Endangered Species Act of 1973, 16 U.S.C. 1531, *et seq.*, may amend the Biological Impact Evaluation Constraints identified in the September 14, 2011 report. Such amendments are pursuant to, and shall not be deemed a modification or amendment of, [the] Compact.
- iv. The exercise of this water right shall conform with the minimum instream flow schedules, as measured at the USGS gaging station on the Flathead River at Columbia Falls (12363000) and the USGS gaging station on the Flathead River at Polson (12372000) as identified in Tables 3 through 6 of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study, as well as the minimum flow requirements set forth in Table 5 must also be met downstream at USGS gaging station on the Flathead River at Perma (123887000). The exercise of this water right shall also conform to the ramping rates, as measured below Kerr and Hungry Horse Dams, and identified in Tables 3 through 6 of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study. In

the event that the minimum instream flow schedules or ramping rates are not met, the use of the water right set forth in [Part] III.C.1.c [of this Decree] shall be suspended until such time as those minimum instream flow schedules and ramping rates are achieved. The Parties upon mutual written agreement, and in conformance with applicable Endangered Species Act and Federal Energy Regulatory Commission licensing requirements for the three previously identified sites, may amend the limitations for releases from Hungry Horse Reservoir that are required to conform with minimum instream flow and ramping rate schedules at these sites. Such amendments are pursuant to, and shall not be deemed a modification or amendment of, [the] Compact.

- v. The exercise of this water right shall also conform with the Flathead Lake filling criteria identified on page 12 of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study.
  - vi. The Tribes may use any amount of the stored water identified in [Part] III.C.1.c.i [of this Decree] that is not necessary to be released each year pursuant to the provisions of [Parts] III.C.1.c.ii-v [of this Decree], for any beneficial purpose, subject to the terms and conditions of this Compact, including the total diversion and depletion volumes associated with the water right set forth in [Part] III.C.1.c [of this Decree].
  - vii. Use of the 90,000 Acre-feet of water from Hungry Horse Reservoir is subject to the approval of, and any terms and conditions specified by, Congress.
  - viii. The priority date for Flathead System Compact Water is July 16, 1855.
  - ix. Any development by the Tribes of this Flathead System Compact Water Right outside the boundaries of the Reservation shall be pursuant to [Part] IV.B.[3 of this Decree].
  - x. The abstract of water right for this Flathead System Compact Water Right is attached hereto as [part of Decree Appendix 2 and Compact] Appendix 9.
- d. Instream Flow Rights on Reservation.**
- i. **Natural Nodes.** The Tribes have Instream Flow rights in the quantities and locations identified in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 10.
  - ii. **FIIP Nodes.** The Tribes have Instream Flow rights in the quantities and locations identified in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 11. The exercise of these

rights is subject to the provisions of the FIIP Water Use Agreement entered into by the Tribes, the Flathead Joint Board of Control, and the United States.

- iii. **Other Instream Flows.** The Tribes have Instream Flow rights in the quantities and locations identified in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 12. The Tribes shall defer the enforcement of each of these rights until an enforceable flow schedule for that right has been established pursuant to the process set forth in the Law of Administration for the development of such enforceable schedules.
- iv. **Interim Instream Flows.** Until such time as the Instream Flow water rights set forth in [Part] III.C.1.d.ii [of this Decree] become enforceable, the Tribes shall be entitled to enforce those interim instream flows established pursuant to *Joint Board of Control v. United States*, 832 F.2d 1127, *cert. denied*, 486 U.S. 1007 (1988), in any stream subject to those interim instream flows. These interim instream flows are identified in the document attached [to the Compact] as Appendix 13. The Tribes and the United States shall enforce these interim instream flows only pursuant to existing practice as of November 1, 2012, as described in the protocols attached [to Compact] Appendix 14. [Sentence omitted as unnecessary for this Decree.] Once the Instream Flow water rights set forth in [Part III.C.1.d.ii of this Decree] become enforceable for any stream identified in this [Part III.C.1.d.iv of this Decree], the interim instream flow for that stream shall cease to be effective in the relationship identified in [Compact] Appendix 13.
- v. The priority date for the Instream Flow water rights set forth in this [Part] III.C.1.d [of this Decree] is time immemorial.
- e. **Minimum Pool Elevations in Flathead Indian Irrigation Project Reservoirs.** The Tribes have the right to water necessary to maintain minimum pool water levels for FIIP reservoirs in the quantities and locations set forth in the table and abstracts of water right appended hereto as [part of Decree Appendix 2 and Compact] Appendix 15. The exercise of these rights is subject to the restrictions of the Bureau of Indian Affairs' annual review of reservoir operations.

The priority date for the water rights set forth in [Part] III.C.1.e [of this Decree] is July 16, 1855.
- f. **Wetland Water Right.** The Tribes have the right to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 16.



The priority date for the Wetlands water rights set forth in [Part] III.C.1.f [of this Decree] is time immemorial.

- g. High Mountain Lakes Water Right.** The Tribes have the right to all naturally occurring water necessary to maintain the High Mountain Lakes identified in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 17.

The priority date for the High Mountain Lakes water rights set forth in [Part] III.C.1.g [of this Decree] is time immemorial.

- h. Flathead Lake.** The Tribes have the right to all naturally occurring water necessary to maintain the level of the entirety of Flathead Lake at an elevation of 2883 feet above mean sea level as described in the abstract of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 18.

The priority date for the water right set forth in [Part] III.C.1.h [of this Decree] is time immemorial.

- i. Boulder Creek Hydroelectric Project.** The Tribes have the right to water necessary to operate the Boulder Creek Hydroelectric Project as identified in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 19.

The priority date for the Boulder Creek Hydroelectric Project water right set forth in [Part] III.C.1.i [of this Decree] is July 16, 1855.

- j. Hellroaring Hydroelectric Project.** The Tribes have the water right to water necessary to operate the Hellroaring Hydroelectric Project as identified in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 20.

The priority date for the Hellroaring Hydroelectric Project water right set forth in [Part] III.C.1.j [of this Decree] is July 16, 1855.

- k. Wetlands Appurtenant to Lands Owned by Montana Fish Wildlife and Parks.** The Tribes and MFWP have the right to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 21.

The priority date for Wetland water rights appurtenant to lands owned by MFWP is time immemorial. [The remainder of the provisions of Compact Article III.C.1.k omitted as unnecessary for this Decree.]

- 1. Wetlands Appurtenant to Lands Owned by Department of Interior Fish and Wildlife Service.** The Tribes and DOI FWS have the right to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached as [part of Decree Appendix 2 and Compact] Appendix 23.

The priority date for Wetland water rights appurtenant to lands owned by DOI FWS is time immemorial. [The remainder of the provisions of Compact Article III.C.1.1 omitted as unnecessary for this Decree.]

**D. Instream Flow Water Rights Off of the Reservation.**

- 1. Mainstem Instream Flow Right in the Kootenai River (Basin 76D).** The Tribes have an Instream Flow water right for the mainstem of the Kootenai River for the reach and with the associated flow rates set forth in the abstract of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 25. The measurement point for this water right is USGS streamflow gage #12305000 located at Leonia, Idaho.
  - a. The priority date for this water right is time immemorial.
  - b. The period of use of this water right is January 1 to December 31 of each year.
  - c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose.
  - d. The point of diversion and place of use for this water is instream. This water right shall not be exercised in conjunction with any artificial diversion.
  - e. The ability to enforce this right shall be suspended so long as Libby Dam remains in existence and the Army Corps of Engineers' operations of that dam are conducted consistently with the 2008 Federal Columbia River Power System Biological Opinion, and the 2010 updated Biological Opinion, specifically as described in Reasonable and Prudent Alternative Action (RPA) No. 4 (Storage Project Operations), Table No. 1 (Libby Dam), including the Northwest Power and Conservation Council's 2003 mainstem amendments to the Columbia River Basin Fish and Wildlife Program, or any subsequent Biological Opinion(s) governing the same RPAs and Operations.
  - f. In the event of changes to the U.S. Army Corps of Engineers' (Corps) responsibilities under the Endangered Species Act of 1973, 16 U.S.C. 1531, *et seq.* (ESA), such as the delisting of resident and anadromous fish species, that no longer require the Corps to operate Libby Dam pursuant to ESA section 7 biological opinions or other substantive ESA requirements, the United States, acting through the Corps, the Tribes, and the State shall establish written protocols and understandings on meeting and enforcing the Tribes' mainstem

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Instream Flow right in the Kootenai River while also ensuring that the Corps' operations of Libby Dam meet all Federal statutory and regulatory requirements and obligations. Provided however, that any such enforcement protocol shall not alter the limitations on Call set forth in [Part] III.D.1.g. [of this Decree].

- g. Should the suspension on enforcement set forth in [Part] III.D.1.e [of this Decree] be lifted due to the removal of Libby Dam, this water right may be exercised to make a Call only against junior users whose point of diversion is from the mainstem of the Kootenai River and not its tributaries, the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater that is connected to the mainstem of the Kootenai River, and whose flow rate is greater than 100 gallons per minute.
- h. Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period.

**2. Mainstem Instream Flow Right in the Swan River (Basin 76K).** The Tribes have an Instream Flow water right for the reach of the mainstem of the Swan River with the associated flow rates set forth in the abstract of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 26. The measurement point for this water right is USGS streamflow gage #12370000 located immediately below Swan Lake near Big Fork, Montana.

- a. The priority date for this water right is time immemorial.
- b. The period of use of this water right is January 1 to December 31 of each year.
- c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose.
- d. The point of diversion and place of use for this water right is instream. This water right shall not be exercised in conjunction with any artificial diversion.
- e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater connected to surface sources in Basin 76K and whose flow rate is greater than 100 gallons per minute.
- f. Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period.

- 3. Mainstem Instream Flow Right in the Lower Clark Fork River (Basin 76M and 76N).** The Tribes have a 5000 cfs Instream Flow water right for the reach of the mainstem of the Clark Fork River as set forth in the abstract of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 27. The measurement point for this water right is USGS streamflow gage #12391950 located immediately below Cabinet Gorge Dam in Idaho.
- a. The priority date for this water right is time immemorial.
  - b. The period of use of this water right is January 1 to December 31 of each year.
  - c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose.
  - d. The point of diversion and place of use for this water right is instream. This water right shall not be exercised in conjunction with any artificial diversion.
  - e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce this water right only against junior users whose point of diversion is from the mainstem of the Clark Fork River and not its tributaries, the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater connected to the mainstem of the Clark Fork River and whose flow rate is greater than 100 gallons per minute.
  - f. Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period.
  - g. For so long as the Cabinet Gorge and Noxon Dams remain in existence, the enforceable level of this right is a flow rate equal to the lesser of 5000 cfs or the minimum flow level established by the FERC as a condition on the license for the Cabinet Gorge and Noxon Dams as that license condition may be modified over time.
- 4. Co-ownership of Instream and Public Recreation Water Rights Held by MFWP.**
- a. Upon the Effective Date, the Tribes shall be added as a co-owner with MFWP of the Water Rights Arising Under State Law held by MFWP for Instream Flow and recreation purposes that are identified on the tables attached [to the Compact] as Appendix 28 and Appendix 29. Nothing in this co-ownership changes any of the other elements of these Water Rights Arising Under State Law, including their priority dates or flow rates.
    - i. The Water Rights Arising Under State Law identified in [Compact] Appendix 28 [and the abstracts of which are attached

hereto as part of Decree Appendix 3] shall be included as part of the proposed decree to be filed with the Montana Water Court pursuant to Article VII.B.1 [of the Compact].

ii. [Omitted as unnecessary for this Decree.]

b. [Omitted as unnecessary for this Decree]

**5. Co-ownership of Water Right Number 76M 94404-00 (Milltown Dam) in Basin 76G (Upper Clark Fork).**

- a. Upon the date the ratification of this Compact by the Montana legislature becomes effective under State law, Water Right Arising Under State Law number 76M 94404-00 is changed as follows: the right is split into two separate active and enforceable Water Rights Arising Under State Law, 76M 94404-01 and 76M 94404-02, and the original water right elements shall be changed to support the maintenance and enhancement of fish habitat and shall take the form of two enforceable hydrographs. The elements of the changed and split water right are set forth in the two water rights abstracts attached hereto as [part of Decree Appendix 3 and Compact] Appendix 30. The measurement point for 76M 94404-01 will move upstream along the Clark Fork River to USGS gage #12334550 at Turah, Montana, and the measurement point for 76M 94404-02 will move upstream along the Blackfoot River to USGS gage #1234000 at Bonner, Montana.
- i. The period of use of this water right is January 1 to December 31 of each year.
- ii. The point of diversion and place of use for this water right is instream.
- iii. This water right shall not be exercised in conjunction with any artificial diversion.
- iv. MFWP, and the Tribes after they become co-owners, and subject to the limitation on enforcement set forth in [Part III.D.5.c, of this Decree] shall be entitled to make a Call to enforce this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater and whose flow rate is greater than 100 gallons per minute.
- v. The enforceable levels of this water right are identified in the table attached hereto as [part of Decree Appendix 3 and Compact] Appendix 31. The minimum enforceable level of this right is 700 cfs at the location

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of USGS gage #1234000 at Bonner, and 500 cfs at the location of USGS gage #12334550 at Turah.

- vi. Call may be initiated on the day following a five-consecutive-day-period where four out of five average daily river flows fall below their respective daily enforceable hydrographs values; Call may persist until such time as two average daily flows of the previous five-consecutive-day-period are in excess of their respective enforceable hydrograph's values.
  - b. Upon the Effective Date, the Tribes shall be a co-owner with MFWP of this water right. As co-owners, the Tribes and MFWP shall meet and confer on a biennial basis, or on such other timeframe as the Tribes and MFWP may mutually agree to, regarding the exercise of these rights, with a goal of establishing a joint plan for the exercise of this right. Notwithstanding this planning process, the Tribes and MFWP each retains the unilateral right to exercise this water right as each deems appropriate, but neither the Tribes nor MFWP has any affirmative duty to take any particular action in regard to the exercise of this right.
  - c. The ability to enforce this right shall be suspended for a period of 10 years from the date the ratification of [the] Compact by the Montana legislature becomes effective under State law. During and after this period, the Tribes and MFWP shall engage with other stakeholders in the Upper Clark Fork Basin on water management subjects including, but not limited to, drought planning and the exercise of this water right in conjunction with the other water rights in the Basin.
  - d. For any analysis of the legal availability of water in the Upper Clark Fork Basin, this right shall be considered to have a year-round flow rate of 2000 cfs as measured at the location of USGS gauge #12340500 below the confluence of the Blackfoot and Clark Fork Rivers.
  - e. No owner of this water right, acting independently or jointly, shall be entitled to lease, sell or change the purpose of this water right.
  - f. The Water Rights Arising Under State Law identified in [Part III.D.5 of this Decree] shall be finally decreed as part of the decree of this Compact that will be proposed to the Montana Water Court pursuant to Article VII.B [of the Compact].
- 6. Contract Rights to Stored Water Held by MFWP in Basin 76H (Bitterroot).**  
[Omitted as unnecessary for this Decree.]
- 7. Instream Flow Right on the North Fork of Placid Creek (Basin 76 F).** The Tribes have the Instream Flow water right for the upper reach of the North Fork of Placid Creek with the associated flow rates set forth in the abstract of water right attached

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hereto as [part of Decree Appendix 2 and Compact] Appendix 35. The measurement point for this water right shall be within the main channel of the North Fork of Placid Creek, below the North Fork Placid Creek FIIP Diversion as located within the SE ¼ of the NW ¼ of the SE ¼ of Section 29 in Township 17 North Range 16 West.

- a. The priority date for this water right is time immemorial.
- b. The period of use of this water right is January 1 to December 31 of each year.
- c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose.
- d. The point of diversion and place of use for this water right is instream. This water right shall not be exercised in conjunction with any artificial diversion.
- e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is surface water of Placid Creek, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater connected to Placid Creek and whose flow rate is greater than 100 gallons per minute.
- f. Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period.
- g. The exercise of this portion of the Tribal Water Right is subject to the provisions of the FIIP Water Use Agreement entered into by the Tribes, the Flathead Joint Board of Control, and the United States.

**8. Instream Flow Rights on Kootenai River Tributaries (Basin 76D).** The Tribes have Instream Flow water rights for the reaches of the Kootenai River tributaries Big Creek, Boulder Creek, Steep Creek and Sutton Creek, with the associated flow rates set forth in the abstracts of water right attached hereto as [part of Decree Appendix 2 and Compact] Appendix 36.

- a. The priority date for this water right is time immemorial.
- b. The period of use of this water right is January 1 to December 31 of each year.
- c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose, changed to consumptive use, or transferred to different ownership.
- d. The point of diversion and place of use for this water right is instream. This water right shall not be exercised in conjunction with any artificial diversion.

- e. Water rights held by the United States Forest Service pursuant to the United States Forest Service-Montana Water Rights Compact 85-20-1401, MCA, shall not be subject to Call by the Tribes and/or the United States on behalf of the Tribes.
  - f. The recognition of the Instream Flow water rights in [Part] III.D.8 [of this Decree] does not confer on the Tribes any authority over the management of National Forest System lands within Basin 76D, or any claim to ownership or other rights in that land. With the exception of future diversionary uses by the United States on National Forest System lands in excess of the Forest Service's existing or future reserved rights identified in [Part] III.D.8.e [of this Decree] the Tribes hold the United States harmless for delivery of water or maintenance of flows to meet this instream flow right in Basin 76D.
- E. Period of Use.** The period of use of the Tribal Water Right set forth in [Part] III [of this Decree] shall be January 1 to December 31 of each year, provided however, that any portion of that water right that is dedicated to seasonal use, including irrigation use, shall have a period of use as set forth in the registration of such right pursuant to the Law of Administration, if applicable, or as otherwise provided in the abstract of any such water right [attached hereto as part of Decree Appendix 2], or in the FIIP Water Use Agreement attached [to the Compact] as Appendix 3. [The period of use of any Water Right Arising Under State Law owned exclusively by the Tribes or by the Tribes jointly with Montana Fish Wildlife and Parks or with the United States Fish and Wildlife Service shall be the period identified on the abstract of water right for that particular right as set forth in Decree Appendix 3.]
- F. Points and Means of Diversion.** The points and means of diversion for use of the Tribal Water Right [or any Water Right Arising Under State Law owned exclusively by the Tribes or by the Tribes jointly with Montana Fish Wildlife and Parks or with the United States Fish and Wildlife Service] set forth in this [Part]III [of this Decree] are as set forth in the abstracts of water rights attached to this [Decree as part of either Decree Appendix 2 or Decree Appendix 3] or as may be provided for under the Law of Administration.
- G. Call Protection.**
- 1. Non-Irrigators.** The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this [Decree], and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose(s) do(es) not include irrigation.
  - 2. Groundwater Irrigators with Flow Rates Less Than 100 Gallons Per Minute.** The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this [Decree] and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose is irrigation and whose source of supply is Groundwater and whose flow rate is less than or equal to 100 gallons per minute.



**3. Irrigators Within the FIIP Influence Area.**

- a.** The Tribes, the United States, and, pursuant to the FIIP Water Use Agreement, the Project Operator and the Flathead Joint Board of Control, agree to relinquish their right to exercise the Tribal Water Right to make a Call against that portion of any Water Right Arising Under State Law identified in [Part] III.G.3.b [of this Decree] that is equal to the quantity of water established as the Farm Turnout Allowance, or the quantity of that owner's historic beneficial use, whichever is less, whose owner enters into a consensual agreement as described in this [Part] III.G.3 [of this Decree].
- b.** Water Rights Arising Under State Law whose owners are eligible to enter into consensual agreements as described in this [Part] III.G.3 [of this Decree] are those rights:

  - i.** whose purpose is irrigation;
  - ii.** whose point(s) of diversion or place(s) of use are within the FIIP Influence Area; and
  - iii.** whose source of supply is surface water; or
  - iv.** whose source of supply is Groundwater and whose flow rate is greater than 100 gallons per minute.
- c.** The Tribes, the United States, and, pursuant to the FIIP Water Use Agreement, the Project Operator and the Flathead Joint Board of Control, agree to enter into the consensual agreement described in this [Part] III.G.3 [of this Decree] with every owner of a Water Right Arising Under State Law described in [Part] III.G.3.b [of this Decree] who wishes to enter into such an agreement with them. The following conditions shall apply to any such consensual agreement:

  - i.** the owner of the Water Right Arising Under State Law shall measure all diversions, report the measured amount of those diversions to the Project Operator, and agree to divert no more water each year than the quantity established as the FTA for each irrigation season or the quantity of that owner's historic beneficial use as decreed by the Montana Water Court, whichever is less, and shall not expand water use beyond the terms of the agreement;
  - ii.** the owner of a Water Right Arising Under State Law does not acquire any entitlement to any delivery or diversion of water from the FIIP, whether the water is stored or run of the river, by entering into a consensual agreement as described in this [Part] III.G.3 [of this Decree];

- iii. irrigation use pursuant to any Water Right Arising Under State Law whose owner enters into a consensual agreement as set forth in this [Part] III.G.3 [of this Decree] shall be limited to the irrigation season identified annually by the FIIP;
  - iv. the method and frequency of measurement of the diversion must be identified and be at a reasonable level of accuracy and frequency to demonstrate that the diversion does not exceed the FTA for each irrigation season or the quantity of that owner's historic beneficial use, whichever is less; and
  - v. this agreement is permanent and is binding on the heirs and assigns of the owner of each Water Right Arising Under State Law who enters into such agreement.
- d. The entering into a consensual agreement as set forth in this [Part] III.G.3 [of this Decree] does not relieve the owner of any claim to a Water Right Arising Under State Law that is at issue in the Montana General Stream Adjudication from the obligation of prosecuting that water right claim through the Montana General Stream Adjudication.
- e. If a consensual agreement is entered into among the Tribes, United States, the Project Operator and the owner of a Water Right Arising Under State Law described in this [Part] III.G.3.b [of this Decree] prior to the issuance of the final decree for Water Court Basin 76L and 76 LJ, as applicable, that agreement shall terminate as a matter of law if the claimed Water Right is terminated as a result of proceedings conducted in the Montana General Stream Adjudication.
- f. If a consensual agreement is entered into among the Tribes, the United States, the Project Operator, and the owner of a Water Right Arising Under State Law described in this [Part] III.G.3.b [of this Decree] prior to the issuance of the final decree for Water Court Basin 76L and 76 LJ, as applicable, and such owner has a claim in the Montana General Stream Adjudication that is ultimately decreed a quantity of water for that claim less than the quantity established in the agreement, the consensual agreement shall protect only the lesser amount of water.
- g. If the owner of a Water Right Arising Under State Law described in this [Part] III.G.3.b [of this Decree] ceases to use that portion of that water right above the FTA pursuant to a consensual agreement as set forth in this [Part] III.G.3.b [of this Decree]:
- i. that nonuse does not represent an intent by the owner of that water right to wholly or partially abandon that water right or to not comply with the

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terms and conditions of that right; and

ii. the period of nonuse may not create or may not be added to any previous period of nonuse to create a presumption of abandonment.

h. Any use of a Water Right Arising Under State Law subject to a consensual agreement described in this [Part] III.G.3 [of this Decree] exceeding the volume of water specified in the consensual agreement shall be subject to Call by the Tribes, the United States, or the Project Operator for that amount of water in excess of the terms of the consensual agreement.

i. A Person who has both an entitlement to the delivery of water from the FIIP and a Water Right Arising Under State Law to serve the same acreage may only protect from Call, by entering into a consensual agreement pursuant to this [Part] III.G.3 [of this Decree], a total quantity of water equal to the FTA for each irrigation season for each acre served, irrespective of whether the water applied to each acre is pursuant to that Person's FIIP delivery right or that Person's Water Right Arising Under State Law.

**4. Water Rights Upstream of the Reservation (Basins 76I, 76J, and 76LJ).** The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this [Decree], and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any water right located upstream of the Flathead Reservation in Basins 76I, 76J, and 76LJ, except for those Water Rights Arising Under State Law:

a. whose purpose is irrigation and whose source of supply is surface water, and whose point of diversion is:

i. the mainstem of the Flathead River, including Flathead Lake;

ii. the North Fork of the Flathead River;

iii. the Middle Fork of the Flathead River; or

iv. the South Fork of the Flathead River.

b. whose purpose is irrigation, whose source of supply is Groundwater connected to one of the sources identified in [Part] III.G.4.a [of this Decree], and whose flow rate is 100 gallons per minute or greater.

c. The Tribes and the United States agree that the Tribal Water Right recognized in the [Decree] may not be exercised to make Call against any Water Right Arising Under State Law upstream of the Flathead Reservation and located on

a tributary to the Flathead River not identified in [Part] III.G.4.a [of this Decree].

**5. Water Rights on the Little Bitterroot River Outside the Reservation (Basin 76L).**

The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this [Decree], and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose point of diversion is outside the Flathead Reservation and whose source of supply is the Little Bitterroot River or its tributaries.

- 6.** Any Water Right Arising Under State Law the purpose of which is irrigation and that is susceptible to Call by the Tribes pursuant to [Parts] III.D.1.g, III.D.2.e, III.D.3.e, III.D.5.a.iv, III.D.7.e, III.G.4.a, or III.G.4.b [of this Decree] whose purpose is changed after the Effective Date to something other than irrigation shall remain susceptible to Call pursuant to the terms and conditions of this [Decree] as though the purpose of the Water Right Arising Under State Law was still irrigation.

**H. Water Rights Arising Under State Law Acquired by the Tribes.** For lands acquired by the Tribes within the Reservation, the Tribes have the right to any Water Right Arising Under State Law acquired as an appurtenance to the land. At such time as the acquired land is transferred to trust title status or at the conclusion of the adjudication of the Water Rights Arising Under State Law that are held by the Tribes, whichever is later, the Tribes shall file a Trust Transfer form with the Water Management Board, as provided in the Law of Administration and the water right appurtenant to the land shall be transferred to the Tribal Water Right quantified in this [Decree] with a priority date of July 16, 1855, provided that the Tribes shall continue to use the acquired water right as historically used or may change the use of the acquired water right pursuant to the provisions for change of use set forth in [Part] IV.[A of this Decree] and the Law of Administration.

**Part IV. Conditions on Changes and New Development of the Tribal Water Right.**<sup>5</sup>

**A. Change in Uses of the Tribal Water Right.**

Except for those portions of the Tribal Water Right that are not eligible to be changed to another purpose [as set forth in the abstracts of water right for those rights], any user of a portion of the Tribal Water Right who proposes to change such use must seek authorization to change the use of that right. Such applications for authorizations to change use shall be heard and decided by the [Water Management] Board pursuant to Article IV.C.4.b of the Compact and the Law of Administration, provided that the [Water Management] Board may not consider any change application of Flathead System Compact Water unless the applicant has secured the written consent of the Tribal Council to apply for a Change in Use authorization.

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<sup>5</sup> These provisions are copied, except where noted in brackets, from Articles IV.B.4 and 5 of the Compact.

**B. New Development of the Tribal Water Right.**

1. The Tribes, or any Person with authorization from the Tribes, may develop a new use of the Tribal Water Right on the Reservation after the Effective Date. Such development may only proceed upon the issuance of an Appropriation Right for the New Development by the [Water Management] Board pursuant to Article IV.C.4.a [of the Compact] and the Law of Administration.
2. The Tribes, or any Person with authorization from the Tribes, may develop a new use of the Flathead System Compact Water Right set forth in [Part] III.C.1.c [of this Decree] off the Reservation after the Effective Date, but only after complying with the provisions of [Part] IV.B.[3 of this Decree].
3. Any new development by the Tribes of a portion of the Tribes' Flathead System Compact Water Right off the Reservation shall be treated as a change in use. The DNRC shall process each change application pursuant to the provisions of 85-2-302, 307-310 and 314, MCA. Prior to developing Flathead System Compact Water for beneficial use off the Reservation, the Tribes must comply with the provisions of subsections (1)-(3) and (8)-(17) of 85-2-402, MCA, as those provisions read on December 31, 2012;
4. In the event that, after the Effective Date, the Montana legislature substantively amends or repeals any of the sections identified in [Part] IV.B.[3 of this Decree], the Tribes and the DNRC shall meet no later than 60 days after the effective date of the State legislative action amending or repealing to determine whether the provisions of State law set forth in [Part] IV.B.[3 of this Decree] or the new provisions of State law shall govern the process for off-Reservation development of new uses of the Flathead System Compact Water Right set forth in [Part] III.C.1.c [of this Decree]. In the event that the Tribes and the DNRC are unable to agree, the provisions of State law identified in [Part] IV.B.[3 of this Decree] shall remain in effect. Any modification to the provisions of [Part] IV.B.[3 of this Decree] agreed to by the Tribes and the DNRC in response to future State legislative action shall be pursuant to and not a modification or amendment to [the] Compact.
5. If the Tribes' use of Flathead System Compact Water off the Reservation involves diversion or transportation facilities located off the Reservation, the Tribes shall apply for and obtain all permits, certificates, variances and other authorizations required by State laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water, prior to exercising a use of the Flathead System Compact Water Right off the Reservation.

**V. Relationship with Compact.**

This Decree is based upon the Compact. The water rights of the Tribes confirmed in this

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Decree are subject to all conditions upon use and administration set forth in the Compact.

Nothing in this Decree is intended to modify, alter, or amend the terms and provisions of the Compact.

**VI. Jurisdiction of Court.**

Nothing in this Decree or the Compact shall expand the subject matter jurisdiction of the Water Court of the State of Montana.

RESPECTFULLY SUBMITTED for approval this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_, by:

THE UNITED STATE OF AMERICA

THE CONFEDERATED SALISH AND  
KOOTENAI TRIBES OF MONTANA

By: \_\_\_\_\_  
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APPROVED this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_.

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CHIEF WATER JUDGE